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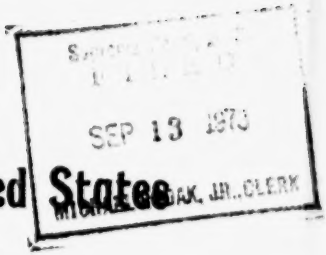

IN THE

Supreme Court of the United States

~~73-478~~

October Term, 1973.

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MARVIN I. BARISH,
WILFRED R. LORRY,
8th Floor Lafayette Bldg.,
5th & Chestnut Sts.,
Philadelphia, Pa. 19106
Attorneys for Petitioner.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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IN THE

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ABRAHAM E. FREEDMAN,

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JAMES M. MORRISSEY, JOSEPH PADILLA, AND RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Abraham E. Freedman, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, entered on June 18, 1973, affirming the judgment of the United States District Court for the Southern District of New York, in the appeal docketed in the said Court of Appeals as No. 73-1082.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Southern District of New York of January 11, 1972 is

reported at 336 F. Supp. 1107. The opinion of the United States District Court for the Southern District of New York dated June 29, 1972 is not officially reported but is printed in the Appendix hereto (A1). The opinion of the United States District Court for the Southern District of New York dated October 26, 1972 is reported at 351 F. Supp. 775 and is printed in the Appendix hereto (A17). The opinion of the United States Court of Appeals for the Second Circuit dated June 18, 1973 is not yet officially reported but is printed in the Appendix hereto (A35). A prior decision of the United States District Court for the Southern District of New York dated May 23, 1969, is reported at 302 F. Supp. 32. The decision of the United States Court of Appeals for the Second Circuit dated February 20, 1970, affirming in part and reversing in part the decision of the District Court of May 23, 1969 is reported at 423 F. 2d 393. Denials of the Petitions for Writs of Certiorari to review the prior decision of the Court of Appeals for the Second Circuit are reported at 399 U. S. 928 (1970), and 400 U. S. 826 (1970).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 18, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where the language and the legislative history of Section 501(a) of the Labor Management Reporting and Disclosure Act of 1959 make it clear that outside trustees are not covered by the Act, and where the Court of Appeals

for the Second Circuit stated that Section 501 was not intended to cover outside trustees did not the Court err in accepting jurisdiction under Section 501 so as to impose liability upon an outside trustee?

2. Where the Court of Appeals found that Section 501(a) was not intended to impose liability on an outside trustee, as that section was designed to deal with union officers, and in the instant action so held with regard to two outside trustees of equal status with trustee Freedman, but nonetheless imposed a surcharge on trustee Freedman under Section 501(a), while holding that Section 501(a) did not apply to outside trustees, did not the Court apply Section 501(a) unequally and improperly, and did it not thereby reach its determination as to Freedman without regard to due process of law?

3. Where, in an action under Section 501(a) of the Labor Management Reporting and Disclosure Act of 1959, the Court had determined that a union had made unauthorized payments to a pension plan, but where all the payments were returned to the union with interest and the union made whole for all of its losses, were not members who brought an action to surcharge the trustees of the pension plan without standing to sue?

4. Where a trust instrument, by its terms, is to be governed by the law of New York and where under that law a provision exempting a trustee from liability in the absence of wilful negligence or bad faith is the rule, did not the Court err in violating State law when it surcharged Freedman as a trustee without making a finding of wrongful misconduct?

STATEMENT OF THE CASE.

Plaintiffs, three members of the National Maritime Union, brought suit under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. Section 501 to challenge payments made by the National Maritime Union to a pension plan to provide benefits for certain Union employees. Following a decision from the District Court and subsequent appeals, the payments that were held to have been invalid were returned to the Union with interest. Notwithstanding this repayment to the Union and notwithstanding the facts that plaintiffs were not beneficiaries of the pension plan nor could the Union recover anything by surcharging the trustees, the District Court permitted plaintiffs to bring an action against the trustees to surcharge them for payments previously made by them. The District Court subsequently surcharged Mr. Freedman, one of the trustees, an attorney and petitioner herein, $222,000 plus interest, for the amount of the pension paid to Mr. Perry, one of the employees held ineligible to receive the pension. The District Court's decision and the affirmance of the Court of Appeals violated well established principles of standing to sue, exceeded the jurisdictional requirements of Section 501, and denied petitioner due process.

The decisions of the courts below occurred within the following factual context. A trust agreement was entered into by the National Maritime Union with three trustees in 1952, establishing a fund to provide pensions for the Union's officers. The three trustees were the attorney, accountant, and pension fund advisor that headed the professional firms employed by the Union. A revision was made to the trust agreement in 1961, extending coverage of the pension plan to certain staff employees of the Union

including Mr. Perry, assistant to the president of the National Maritime Union. Petitioner became General Counsel of the National Maritime Union and a trustee of the pension plan in 1963.

An employment contract was negotiated with Mr. Perry in 1966 by Mr. Curran, president of the National Maritime Union. Mr. Perry was guaranteed employment with the National Maritime Union through 1974. At that time, Perry, who had been employed by the Union since 1954, would be eligible for a pension under the Officers' Pension Plan. The contract provided that if Mr. Perry were terminated or became incapacitated:

> ". . . In the event, however, of such termination, or if such incapacity should be substantial or total, Perry shall have the option to demand and receive at one time or over any period that he shall specify an amount equal to the said total salary, including contributions to the NMU Officers' Pension Plan and any other fringe benefits payable to National Officers which he would have received during the balance of the original term or any renewal or extension hereof."

This contract was submitted to the trustees. Following a three page opinion letter prepared by Mr. Freedman, which found the contract valid and binding as it related to Mr. Perry's pension rights, the trustees signed the contract.

Mr. Perry was fired in 1969. He immediately applied for payment of his pension benefits in a lump sum, as permitted by the Officers' Pension Plan, in order to obtain capital gains treatment as provided by the Internal Revenue Code. It was the opinion of Mr. Freedman that Mr. Perry was entitled to payment at that time and would not have to wait until the expiration of his contract in 1974.

One month after Mr. Perry was fired this action was instituted. The District Court granted summary judgment

for plaintiffs and directed an accounting and the return to the Union from the Pension Plan of all monies that had been paid to fund pensions for non-officers. Following unsuccessful appeals and an accounting, the money was immediately repaid by the trustees to the Union with interest.

The District Court permitted plaintiffs to bring an action against the trustees to surcharge them for pension payments previously made to Mr. Perry. The District Court found that all of the trustees were negligent in making the payments to Mr. Perry, but that they were not guilty of wilful misconduct. The District Court further found that Mr. Freedman acted "recklessly" in rendering his opinion that Mr. Perry was entitled to immediate payment of his pension. Despite the finding of *no* wilful misconduct and existence of the exculpatory clause of the trust exonerating the trustees from liability except for wilful misconduct, the District Court surcharged Mr. Freedman alone for the payment to Mr. Perry.

The Court of Appeals affirmed the decision of the District Court. It failed to discuss the threshold question of standing to sue despite the lengthy discussions in Briefs and at argument. Of greater import, the Court of Appeals implicitly ruled that Section 501 applied to Freedman, even though it did not apply to other similarly situated trustees.

In dealing with the effect of the trust exculpatory clause in view of amendments to Section 501, the Court stated:

> "Moreover, even if the effective date of the agreement were held to be subsequent to the enactment of Section 501(a), the plaintiffs could not prevail. The ban of Section 501(a) against all 'general exculpatory provisions by a labor organization in its constitution, by-laws or resolutions' does not apply to a standard trustee exculpatory clause of a trust agreement. Neither

the express language, the legislative history of the section or the purpose of the section indicate the desire of Congress to include trustee exculpatory provisions within the general ban on exculpatory provisions. The language of the section is clearly aimed at union officers, not trustees; nor can a trust be equated with 'a labor organization.' The purpose of Congress in enacting Section 501(a) supports this literal interpretation of the provision. The section was aimed at stopping the pilfering of union funds by union officers, not at the conduct of trustees acting in their capacity as fiduciaries.''

In effect, the Court's inconsistent opinion failed to recognize that if Section 501(a) was inapplicable to trustee exculpatory provision, it is inapplicable to the very trustee conduct for which Mr. Freedman was surcharged. Thus, the Courts below did more than make findings that were erroneous; they applied the law unequally so as to deprive Freedman of due process.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Court Below Violated the Jurisdictional Provisions of Section 501(a) of the Act When It Determined That Freedman, an Outside Trustee, Was Covered by the Act.

Section 501(a) of the Act provides:

> "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

It is clear that Section 501(a) applies to "officers, agents, shop stewards, and other representatives of a labor organization." Unless one falls within these categories, his conduct is not regulated by Section 501(a). Outside trustees cannot by any stretch of the imagination fall within one of these categories, and, accordingly are not within the purview of the Act. Since Mr. Freedman was such an outside trustee, (i.e. a trustee of the Pension Plan, not of the Union), the Courts below violated the jurisdictional provisions of Section 501(a) when they assumed jurisdiction to surcharge him.

A review of the legislative history of Section 501(a) confirms the fact that outside trustees cannot be deemed to fall within the purview of Section 501(a). Section 301 of McClellan Bill, S. 1137, 86 Cong. 1st Sess. (1959), 1 Legislative History 294-295, and Section 610 of the Kennedy-Ervin Bill, S. 1555, 86 Cong., 1st Sess. (1959), 1 Legislative History 567-577, specifically include officials of "a trust in which a labor organization is interested." See the Kennedy-Ervin Provision:

> "Every officer, agent, or other representative of a labor organization engaged in an industry affecting commerce, or of a trust in which such organization is interested, shall with respect to any money or other property in his custody or possession by virtue of his position as such officer, agent, or representative, have a relationship of trust to any such labor organization and the members thereof, or to any such trust and the beneficiaries thereof, and shall be responsible in a fiduciary capacity for such money or other property, notwithstanding any exculpatory clause or action purporting to exempt him from such responsibility."

Section 501(a) as passed did not contain the key language "or of a trust in which such organization is interested . . ."

The legislative history is not surprising in view of the linguistic structure of the Act. In Section 502(a) *specific reference* is made to all trustees, including outside trustees:

> "Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed $5,000.00 in value), or of a trust in which a labor organization is interested, who handles funds, or other property thereof shall be bonded for the faithful discharge of his duties . . . ."

Had Congress intended to subject outside trustees to Section 501(a), the phrase "of a trust in which a labor organization is interested" would have been set forth. To find otherwise would be to act in complete disregard of Congressional intent.

In Section 3q, the definition of "officer, agent, shop steward, or other representative" appears. Outside trustees are conspicuously absent from that definition:

> " 'Officer, agent, shop steward, or other representative', when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried non-supervisory professional staff, stenographic, and service personnel."

Again, Congress left out the language "of a trust in which a labor organization is interested." If outside trustees were meant to be included in the definition that specific language would have been inserted into the Act.

The use of "officer, agent, shop steward, and other representative of a labor organization" in other portions of the Act conclusively establishes that outside trustees are not included within the definition of Section 3q. Situations covered by Section 203(a)(1), which focuses on employer payments, loans, etc. to any "officer, agent . . ." are totally inappropriate to outside trustees. The same is true with regard to Sections 505 and 609 of the Act. The consistent expressed intention of Congress to exclude outside trustees from the class of "officers, agents, shop stewards, or other representatives" in other parts of the Act, makes it abundantly clear that they were excluded likewise from Section 501(a). See *Tucker v. Shaw,* 308 F. Supp. 1 (E. D. N. Y. 1970). It should be observed that were such outside trustees meant to be included within Section 501(a), there would have been no need for the numerous attempts by members of Congress to pass legislation imposing federal fiduciary duties upon trustees of private pension plans. See S. 4, 93rd Cong., 1st Sess., Section 501 et seq. (1973); S. 3598, 92nd Cong., 2nd Sess., Section 201 et seq. (1972); S. 2, 92nd Cong., 1st Sess., Section 402 (1971). The thrust of Congressional review is that federal fiduciary duties are not applicable to outside trustees of union pension plans. See Subcommittee on Labor of House Committee on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plans Study, 1971 S. Rept. 92-634, 92nd Cong., 2nd Sess. at 91-99 (1972).

Further, the Court of Appeals for the Second Circuit itself reached this conclusion when, in dealing with the effect of the exculpatory provisions of the trust agreement, it stated:

> "Moreover, even if the effective date of the agreement were held to be subsequent to the enactment of Section 501(a), the plaintiffs could not prevail. The ban of Section 501(a) against all 'general exculpatory provisions by a labor organization in its constitution, by-laws or resolutions' does not apply to a standard trustee exculpatory clause of a trust agreement. *Neither the express language, the legislative history of the section or the purpose of the section indicate the desire of Congress to include trustee exculpatory provisions within the general ban on exculpatory provisions. The language of the sections is clearly aimed at union officers, not trustees; nor can a trust be equated with 'a labor organization.' The purpose of Congress in enacting Section 501(a) supports this literal interpretation of the provision. The section was aimed at stopping the pilfering of union funds by union officers, not at the conduct of trustees acting in their capacity as fiduciaries.*" (Emphasis supplied.)

The Court, by its very language, admitted that neither the language nor intent of the drafters of this legislation was to apply Section 501 to an outside trustee. Accordingly, the legislative history of the Act, the language of the Act, and the interpretation of this statute by the Court of Appeals for the Second Circuit makes it abundantly clear that Section 501 does not afford either a jurisdictional or substantive base upon which to make a determination against Freedman in his capacity as an outside trustee.

II. Where the Court of Appeals for the Second Circuit Found That Section 501(a) Was Not Intended to Impose Liability on an Outside Trustee as That Section Was Designed to Deal With Union Officers, and Therefore, Stated That Two Outside Trustees of Equal Status With Trustee Freedman Were Not Covered by the Act, the Court Applied Section 501 Unequally and in a Manner Which Denied Trustee Freedman Due Process When It Nonetheless Imposed Liability Upon Him as an Outside Trustee Under Section 501(a).

One need look no further than the previously quoted language of the Second Circuit Court of Appeals to reach the conclusion that the acts of trustee Freedman were not within the literal or intended scope of Section 501(a). The plain meaning of the Act limits its effect to conduct involving the *fiduciary* relationship of "officers, agents, shop stewards, and other representatives to the Union. It is clear

> ". . . that it (Section 501(a)) is not a catchall provision under which Union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them." *Gurton v. Arons*, 339 F. 2d 371 (2d Cir. 1964).

See also *Coleman v. Brotherhood of Railway & S. S. Clerks, etc.*, 340 F. 2d 206 (2d Cir. 1965).

The evidence below was undisputed that trustee Freedman is an "outside-trustee." He was not an "officer, agent, shop steward, or other representative" of the National Maritime Union required by the very terms of Section 501(a).

In holding that Trustees Segal and Karchmer could not be surcharged for the Perry payment, the District Court held that "(t)he Agreement and Declaration of Trust

specifically protects them from liability from the acts of any other trustees." The Court of Appeals for the Second Circuit affirmed this holding of a District Court *but in so doing stated:*

> "The ban of Section 501(a) against all 'general exculpatory provisions by a labor organization in its constitution, by-laws or resolutions' does not apply to a standard trustee exculpatory clause of a trust agreement . . . *The language of the section is clearly aimed at union officers, not trustees; nor can a trust be equated with a 'labor organization'.* . . . The section was aimed at stopping the pilfering of union funds *by union officers, not at the conduct of trustees acting in their capacity as fiduciaries.*" (Emphasis supplied.)

In short Trustees Segal and Karchmer could not be surcharged because Section 501(a) does not apply to the conduct of trustees acting in their capacity as trustees.

Yet, the Court of Appeals affirmed the surcharge imposed upon Trustee Freedman. The effect of this holding is to say that Section 501(a) does not apply to actuaries who are trustees nor to certified public accountants who are trustees, but it does apply to attorneys who are trustees of Pension and Welfare funds. The utter absurdity and illogic of this result is apparent. Such an interpretation of Section 501(a) results in an unequal application of the language of the Act to Freedman as distinguished from the other trustees and if permitted to stand, results in a deprivation of Freedman's rights and property without due process of law.

Congress made no distinction between lawyer and non-lawyer trustees when enacting Section 501(a); rather, *as correctly stated by the Court below,* the determinant of Section 501(a) liability is the status of the trustee within

the Union. An "insider" trustee may be liable pursuant to Section 501(a); an "outsider" can never be. In the instant action, all three trustees were "outsiders." All three trustees, therefore, were insulated from Section 501(a) liability. All three trustees were entitled, as a matter of law, to the same judicial construction of Section 501(a).

By holding that Section 501(a) applies only to union insiders, the Court of Appeals was required to reverse the decision of the District Court vis-à-vis a surcharge of trustee Freedman. The failure of the Appeals Court to so act was obviously improper. If this disparate result is permitted to stand, Freedman will be judged by a different standard from the other trustees, resulting in his being surcharged without equal application of the law and without due process.

III. In Assuming Jurisdiction to Surcharge Trustees, the Court Below Violated Both the Express Statutory Language of Section 501 and the Numerous Decisions of This Court Which Established That Unless Otherwise Provided by Statute, Standing to Sue Exists Only Where There Is "Injury in Fact."

As this Court frequently has recognized, the underlying principle of law is that absent specific statutory authority, standing to sue depends upon the plaintiff's establishing that the challenged action caused him injury in fact. See *Sierra Club v. Morton*, 405 U. S. 727, 31 L. Ed. 2d 636 (1972); *Flast v. Cohen*, 392 U. S. 83, 20 L. Ed. 2d 947 (1968). In *Flast*, at page 961, the Court stated:

> "Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the con-

> cept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U. S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."

An allegation of "injury" by itself is insufficient to form a basis for "standing." It is the party seeking judicial intervention that must have suffered the alleged injury. *Sierra Club v. Morton, supra.*

Even cursory review of the factual context in which this litigation has proceeded renders the conclusion unavoidable that any "injury in fact" to the plaintiffs is logically and legally impossible. Following the District Court's decision in *Morrissey v. Curran*, 302 F. Supp. 32, 35 (S. D. N. Y. 1969), an accounting was held and the monies claimed to have been improperly paid to the trustees of the National Maritime Union Officers' Pension Plan were immediately repaid with interest to the trustees of the pension plan of the union. As soon as repayment was effected and the Union was made whole for any alleged losses, the injury ceased to exist. The plaintiffs were not beneficiaries of the pension plan. The money had been

repaid. The Union itself was insulated from liability for additional contributions to the pension plan by Article IV, Section 3 of the trust agreement establishing the pension plan:

> "Liability for the payment of the pensions and benefits provided for under the Pension Plan adopted pursuant to the within Agreement and Declaration of Trust and any other liability arising under or out of this Agreement *shall be limited exclusively to the assets of the Trust Fund,* and in the event that such assets are at any time insufficient to provide for the payment of any pension or benefit payments due under the Pension Plan, or any other such liability, no liability for the payment thereof shall attach to or may be asserted against the Trustees." (Emphasis supplied.) [1]

The absence of a real injury precludes plaintiffs from obtaining the necessary "standing" to bring this action.

This action was brought pursuant to the provisions of Section 501(b):

> "When any officer, agent, shop steward, or representative is alleged to have violated the duties declared in sub-section (a) . . . such member may sue such officer, agent, shop steward, or representative . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization . . . ."

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1. The District Court erroneously assumed that the union might be liable for additional contributions to the plan if the fund were impaired by reason or improper payments, and predicated plaintiffs' standing to seek to surcharge defendants on this erroneous assumption. However, under Article IV, Section 3 of the trust agreement, it is clear that there could be no such liability on the part of the union for additional payments, and therefore, plaintiffs could not possibly have had standing on this theory.

Section 501(b) focuses on relief "for the benefit of the labor organization." It makes no reference to "a trust in which a labor organization is interested", in contrast to Section 502(c) of the Act, which makes specific reference to such an entity through this very explicit language. It is clear that Congress in Section 501(b) was providing relief "for the benefit of the labor organization."

It must be remembered that a Federal District Court is not a Court which has general supervision over the administration of trust estates as do surrogate courts or orphans' courts, which have such jurisdiction by virtue of State law. The Federal District Courts are statutory courts with a prescribed, delegated and limited jurisdiction, which never has included the authority of surrogate or orphans' courts. There is nothing in the Labor Management Reporting and Disclosure Act of 1959 or its legislative history which even remotely suggests that Congress, in enacting the statute, intended Federal Courts to engage in the day-to-day administration of trusts and pension plans. See *Tucker v. Shaw,* 308 F. Supp. 1, 4 (E. D. N. Y. 1970). The assumption by the District Court that it had inherent jurisdiction to enforce the trust, even though such action would not result in any benefit to the labor organization, is contrary to the explicit statutory language and patently erroneous.

The concept of standing to sue was developed to insure that the judicial power would be called upon only to remedy "injury in fact." *Sierra Club v. Morton, supra; Flast v. Cohen, supra.* Here, as demonstrated above, the payments made by the trustees caused no "injury in fact" to the plaintiffs or to the Union. The plaintiffs had no cause of action against the trustees, and no standing to seek to surcharge them. It follows that the Courts below, in granting plaintiffs standing and in subsequently surcharging petitioner, exceeded both the jurisdictional and substantive as-

pects of Section 501 of the Labor Management Reporting and Disclosure Act. For this reason alone, certiorari should be granted and the decision below reversed.

IV. Where a Trust Provision Exempts a Trustee From Liability in the Absence of Wilful Negligence, Self-Dealing, or Bad Faith, the Decision Below Surcharging Petitioner on the Basis of His Rendering of a Legal Opinion Without Finding Wilful Negligence, Self-Dealing or Bad Faith Is in Direct Conflict With Controlling State Appellate Decisions, Which Decisions Are Binding.

In surcharging petitioner, the courts below adopted a standard for trustee's liability which is in direct conflict with controlling appellate decisions of the courts of the State of New York. By the terms of the trust agreement, the law of New York was to govern the administration of the trust.

The trust agreement establishing the NMU Officers' Pension Plan specifically provides that all questions pertaining to its validity, construction or the acts of the parties thereunder, shall be determined in accordance with the laws of the State of New York.[2] The trust agreement further provides that no trustee shall be liable for any loss sustained by the trust fund, unless such loss is due to the trustee's wilful misconduct.[3] The courts of New York have

2. Article V, Section 5 of the trust agreement provides:

"5. This agreement and the Trust Fund and Pension Plan established hereunder and pursuant hereto have been executed in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts or transactions of the parties hereto shall be determined in accordance with the laws of the State of New York."

3. The trust agreement provides, in Article III, Section C, paragraphs 4 and 5 as follows:

"4. The Trustees shall not be liable for the making, retention, or sale of any investment or reinvestment as made by

held that this type of exoneration clause is enforceable in the absence of "wilful negligence, self-dealing or bad faith," *Matter of Cowles,* 22 A. D. 2d 365, 378, 255 N. Y. S. 2d 160, 174 (1st Dept. 1965), *aff'd,* 17 N. Y. 2d 567, 268 N. Y. S. 2d 327 (1966); *cf., In re City Bank Farmers Trust Co.,* 270 App. Div. 572, 576, 61 N. Y. S. 2d 484, 487 (1st Dept. 1946); *Matter of Clark's Will,* 257 N. Y. 132, 177 N. E. 397 (1931); *Crab v. Young,* 92 N. Y. 56.

In order to be guilty of "wilful misconduct," there must be a finding that the trustee engaged in "intentional wrongdoing." The test is stated in *Collins v. Storer Broadcasting Co.,* 217 Ga. 41, 49, 120 S. E. 2d 764, 769-770 (1961), as follows:

> "A creator of a trust has the right to make a provision in the instrument creating the trust for the exemption of the trustee from personal liability. Anderson v. Bean, 272 Mass. 432 (172 NE 647, 72 ALR 959); Restatement, Trusts 2d, 516, Sec. 222(1). The term 'wilful default' within the meaning of a provision in the instrument creating a trust making each trustee liable only for his own wilful default has been held to mean 'more than involuntary, inadvertent, negligent, mistaken, careless or accidental default. *It means an intentional designing failure to do or not to do something required—an affirmative wrong.*' Thompson v. Hays, 11 F. 2d 244; New England Trust Co. v. Paine, 317 Mass. 542 (59 NE 2d 263, 158 ALR 262). See North

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3. (Cont'd.)
them, as herein provided, nor for any loss to, or diminution of the Fund, except due to their own wilful misconduct.

"5. . . . No Trustee shall be liable for any action taken or omitted by him unless such act or omission is the result of wilful misconduct, nor for the acts of any agent, employee or attorneys connected by the Trustees with reasonable care, nor for any act or omission of any other Trustee."

Adams National Bank v. Curtiss, 278 Mass. 471 (180 NE 217, 83 ALR 607, 620)." (Emphasis supplied.)

In the case at bar, there was neither evidence of intentional wrongdoing nor was there a finding by the Court below that Freedman was guilty of such conduct. Accordingly, the necessary ingredient to take Freedman outside of the protective ambit of the trust provision exempting a trustee from liability is absent. Absent such finding by the court below, the protection afforded the other trustees by the trust agreement applies to Freedman.

What is more, the evidence could not support a finding of such conduct as would result in a surcharge of Freedman. Freedman's opinion turned upon the construction he gave to "employment" in Article VI, Section 3 of the Pension Plan:

> "A Participant shall be given credit for Covered Employment . . . for the period of time he is employed by the NMU in one of the capacities listed in Article I, Sections 5, 6 and 7 of this Plan, and for which employment he receives a salary from the NMU."

For his construction of the period of time during which someone is "employed," Mr. Freedman looked to more than the period during which services were actually rendered; he looked to the period of the entire employer-employee relationship. In doing so, he was amply supported.

In interpreting the provisions of an analogous retirement insurance program, this Court also looked beyond the period during which services were actually rendered. In *Social Security Board v. Nierotko,* 327 U. S. 358 (1946), the Court held that an employee who was awarded two and one-half years' back pay by the NLRB, was entitled to

receive two and one-half years' credit toward his social security benefits. The Social Security Board argued to the Court that since the employee had not worked for that period, he was not entitled to credit. Credit, the Board argued, could only be given for "employment," which the Social Security Act *defined* as "service performed." 327 U. S. at 364. But the Supreme Court concluded that even "service performed"

> "means not only work actually done but the entire employer-employee relationship for which compensation is paid for the employee by the employer." 327 U. S. at 365-366.

See also *Kore v. Celebrezze*, 342 F. 2d 638 (7th Cir. 1965); *Purdy v. Ribicoff*, 198 F. Supp. 812 (D. N. J. 1961).

Use of the "entire relationship" yardstick is particularly apt in construing the provisions of a pension program. Unlike social security, pensions are intended to do more than just provide security for old age. *United States v. Silk*, 331 U. S. 704, 711 (1947). Insofar as the employer is concerned (particularly in non-contributory plans such as the instant one), pensions are a "means of financing the removal of the inefficient" and a "means of inducing long service and employee identification with the employer." M. Bernstein, The Future of Private Pensions 10-11 (1964). In light of such relationship-directed goals, it would seem no less reasonable here than it was in *Nierotko* to look to the "entire relationship" in order to construe "employment."

Indeed, it was most reasonable to do so here. Perry was induced in 1966 to enter into an employment contract which had, as its only source of security, the guarantee of actual employment through 1974 (the year when he would normally qualify for a pension), or, in the event of his

termination prior to that time, the guarantee of the equivalent of actual employment. Had Perry been actually employed through 1974, he would have received salary, benefits, and credit for covered employment through that time. Were Perry discharged during this time, Paragraphs 3 and 4 of the Perry agreement were intended to provide him with nothing less. Further, if Perry so chose, he could receive his salary and other benefits through 1974, at the time of his termination.

The salary and benefits were payable upon demand pursuant to paragraph 3, which provides in part:

> "In the event . . . of such termination . . . Perry shall have the option to demand and receive at one time or over any period that he shall specify an amount equal to the said total salary [through 1974], including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to National Officers which he would have received during the balance of the original term [through 1974] . . . ."

Credit for covered employment was guaranteed pursuant to paragraph 4, which provided in part:

> "For the purposes of determining Perry's entitlement to participation in and benefits from, the NMU Officers Pension Plan, the parties recognize, understand and agree that Perry shall be deemed to be a 'Participant' in 'Covered Employment' (as defined in the said Plan) during the full period of the original term of this Agreement [through 1974] . . . ."

Paragraph 4—read in conjunction with paragraph 3's provision that Perry could demand the *immediate* payment to the pension plan of all the union's contributions through

1974—makes this much clear: The parties to the employment agreement (the members of the National Council, Perry, and the trustees) believed that Perry could demand immediate credit for covered employment through 1974. Were this not the case, a demand for immediate payment of the contributions would have been functionally useless.

In light of these facts, it was neither arbitrary nor capricious for Mr. Freedman to recommend that Perry, at the time of this termination, receive credit for "employment" under Article VI, Section 3 of the pension plan through 1974.

Insofar as the NMU-Perry employer-employee relationship was concerned, Perry's "employment" was employment through 1974. *In view of that alone,* since Perry would never render a day's more service for the NMU after 1969, it made little sense to delay credit for that employment beyond the date of Perry's termination.

But there was more. Upon his termination, Perry's employer intended to (and did) give to Perry all the indicia of employment through 1974—his salary and vacation pay (without any discount whatsoever) and the pension contributions on his behalf. In view of that, it made no sense whatsoever to delay credit for the employment.

No matter how one characterizes petitioner's behavior, it cannot be determined wilful, self-dealing or bad faith. The wrongs with which the District Court charged Freedman—haste and conflict of interest—are neither surchargeable offenses nor are they supported by the Record.

No one has denied that Freedman wrote the Perry agreement two and one-half years before he rendered his 1969 opinion. Additionally, the Record is clear that after the agreement was entered into, the trustees held many conversations with Freedman about the legal effect of paragraph 4 of the agreement and about the trustees' decision to be bound thereby.

In fact, the plaintiffs below submitted in their case the 1966 opinion which Mr. Freedman rendered to the trustees in response to their inquiries, which opinion was the very cornerstone of his 1969 decision. Mr. Freedman concluded there that regardless of whether Perry was terminated before 1974, he would be entitled to "status as a covered employee" through that date.

It is quite apparent that those familiar with the Perry agreement not only shared Freedman's opinion, but totally understood its implications, in the event that Perry requested a lump-sum payment upon his termination.

Joseph Curran, president of the union, well understood the implications, too. On December 18, 1968, after he fired Perry for the first time, Curran instructed the union controller to pay $41,250.01 to the pension fund, "the monies due in accordance with the employment contract agreement with the National Maritime Union of America and William Perry."

Finally, Segal, the actuary, understood the implications, too. A portion of his uncontradicted testimony reads as follows:

> "Q. When you received this letter [the 1969 opinion of Mr. Freedman] the same day you had this conversation, did you in any way in your own mind question the speed or haste with which that letter had been sent or received by you?
>
> "A. I did not . . . . [I]t seemed to me at the time a perfectly routine matter. The contract had previously been discussed more than two years earlier.
>
> "Q. He had opined on it in 1966, had he?
>
> "A. Yes, he had."

What becomes clear from these excerpts and from the record as a whole is that Mr. Freedman, his fellow trustees, the president of the union (if not the rest of the National

Office), and Perry well understood the implications of the NMU-Perry employer-employee relationship in 1966, in 1968, and in 1969 before the call to Mr. Freedman was ever made. The problem raised by the events of Perry's termination simply was not new.

When one has a two and one-half year intimacy with a problem, even if the answer is wrong, it is neither reckless nor unreasonable to give that answer within five minutes, let alone within an hour. As the Court of Appeals for the Second Circuit recently had occasion to say:

> "[S]peed is not necessarily inconsistent with careful consideration, any more than delay is a guaranty of a wise decision." *United States v. Needles,* Docket No. 72-1704 (January 11, 1973).

Further, the District Court wrongly condemned Mr. Freedman for acting simultaneously as a trustee, counsel to the trustees and counsel to the National Maritime Union. Article III, Section C(5), of the trust agreement states that counsel to the trustees may be a trustee also. Historically, counsel to the union was a counsel-trustee under the trust agreement. Under such circumstances, it was reasonable for Mr. Freedman to assume the position he did.

Moreover, when he rendered his 1969 opinion, Mr. Freedman labored under no conflict. He did not advise the union. The union itself, a month before, made its contributions to the pension fund through 1974. Mr. Freedman's only advice was given to the trustees. He advised them what credit Perry was entitled to. There was no conflict of interest of any type existent.

CONCLUSION.

The Courts below erroneously interpreted Section 501 of the Labor Management Reporting and Disclosure Act of 1959 so as to assume jurisdiction over the conduct of an outside trustee, despite the fact that the language of the Act, its legislative history and the finding of the Court of Appeals itself make it clear that Section 501 was not intended to deal with outside trustees. The Court then aggravated this misinterpretation of Section 501 by applying it unequally to Freedman at the same time that it stated it did not apply to trustees who were in an equal position with Freedman. The Court further misinterpreted Section 501 in determining that the plaintiffs below had standing to sue. The Court below refused to follow the law of New York, in surcharging petitioner on the basis of his rendering of a legal opinion, which surcharge was in direct conflict with controlling State Appellate decisions. Finally, it is impossible to characterize petitioner's behavior as being wilful, self-dealing, reckless or in bad faith. On the contrary, petitioner's advice as to the interpretation of the contract was given after a two and one-half year intimacy with the contract which he himself had drawn, and the problems involved with the contract. His decision was well supported by the verbiage of the contract and judicial precedent.

In recent years, there has been an ever-increasing volume of litigation under Section 501 of the LMRDA, without, however, a definitive ruling by this Court on the nature and scope of the liability imposed by the statute. The decision below now has extended the scope of the statute to outside private trustees notwithstanding clear statutory language and legislative history to the contrary, and has imposed an uneven and discriminatory standard of

liability which, unless corrected by this Court, may be applied to the vast volume of litigation now being brought under the statute. Accordingly, it is imperative that these erroneous actions by the Court below be corrected at this time.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARVIN I. BARISH,
WILFRED R. LORRY,
Attorneys for Petitioner.